familiar statute liens, why would it not be well to abolish by statute the present artificial and obscure forms of mortgage contract, the net result of the operation of which no one can define, and to provide for a return to a brief and simple deed of pledge, such as ingenuity has led us away from?

H. W. Chaplin.

BOSTON, March, 1890.

THE RIGHT OF ACCESS AND THE RIGHT TO WHARF OUT TO NAVIGABLE WATER.

THE right to wharf out to navigable water is unknown to the common law of England. The erection of a wharf upon public lands without the consent of the Crown is a purpresture.[1]

There is, however, in the English law what is known as the riparian right of access, incident to lands bordering upon navigable waters. The celebrated case of Lyon *v.* Fishmongers' Company[2] has been understood to decide that this "right of access," like the riparian right to the appropriation and beneficial use of running water, is a "natural right," dependent solely on natural relations.[3] The words of Lord Selborne in that case have been quoted as applicable to the right in question: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream."[4]

Lord Selborne said, with reference to this right: "The cases as to the alterations of the levels of public highways . . . seem to be authorities *a fortiori* . . . because they had not in them the element of a right *jure naturæ*."[5]

These decisions contain almost the only explanation thus far offered in the cases of the origin and nature of the English right of access, and this fact, together with the fact that most riparian rights are "natural rights," necessitates for the proper classifica-

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[1] Gould on Waters, § 21, and authorities cited.

[2] 1 App. Cas. 662.

[3] Lake Superior Land Co. *v.* Emerson, 38 Minn. 406.

[4] 1 App. Cas. 682 (quoted in Lake Superior Land Co. *v.* Emerson, *supra*).

[5] 1 App. Cas. 684 (quoted in Lake Superior Land Co. *v.* Emerson, *supra*).

tion of the right of access an analysis and discussion of natural rights.

I.

There are at least three well-recognized natural rights, — the right to support of land,[1] the right to unpolluted air, the right to running water.[2] These rights have often been called natural easements,[3] from a mistaken notion that they are a benefit in or over the land of another, — the common attribute of easements. They are, however, nothing more than rights of property growing out of certain natural conditions of land, and the rights incident to any one parcel do not extend beyond the boundaries of that parcel.

The right of support is not a right to have the adjoining owner's soil *kept* in its natural condition, but a right to have one's own soil *left* in its natural condition;[4] the right to unpolluted air is simply the right to have the air over one's own soil remain in its natural purity;[5] the right to running water confers no right to control its course or use, either above or below one's own land, provided its natural course and condition upon[6] one's own land remain unchanged.[7]

An interference with my natural rights is but an interference by another with the natural condition of my land. If, through the act of another, less water runs over my land than formerly, or if

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[1] Lateral or subjacent. Humphries *v.* Brogden, 12 Q. B. 739.

[2] "It — namely, the right of support — is analogous to the flow of a natural river or of air." Per Willes, J., Bonomi *v.* Backhouse, Ellis, B. & E. 622, at p. 654.

[3] "Natural rights are a species of easements." Goddard on Easements (Am. ed.), p. 3.

[4] Backhouse *v.* Bonomi, 9 H. L. Cas. 503; Mears *v.* Dale, 135 Mass. 508; Mayor of Birmingham *v.* Allen, 6 Ch. D. 284.

[5] The plea in Flight *v.* Thomas, 10 A. & E. 590, that "for the full period of twenty years" defendant "had enjoyed the advantage of having and using a certain mixen in and upon the said premises," *held* insufficient to support a prescriptive right. Per Lord Denman, C. J. "The plea may be completely proved without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land."

[6] Or *along*. "Lateral contact is as good *jure naturæ* as vertical." Per Lord Selborne, Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, at p. 683.

[7] "I apprehend that a proprietor may, without any illegality, build a mill-dam across a stream within his own property, and divert the water into a mill-lade, without asking leave of the proprietors above him, provided he builds it at a point so much below the lands of those proprietors as not to obstruct the flowing away of water as freely as it was wont; and without asking the leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land." Per Lord Blackburn, Ewing *v.* Colquhoun, 2 App. Cas. 839, at p. 856.

the air over my premises is polluted, or if the surface of my soil is changed, these natural conditions are altered, and, as a result, my natural rights are infringed. In other words, these rights are rights in one's own property, — *corporeal* rights.[1]

Actual *damage*, in the sense of diminution of value for the uses to which the land is actually put, is not essential to the infringement of a natural right. Thus by the uniform current of decisions both in England[2] and America,[3] it has been held that an action may be maintained for a violation of the right of support or of rights in running water, although the land is occupied for no beneficial purpose whatever.[4]

It has also been held that it is no justification for further pollutions that the water or air is already unfit for use.[5]

When the term "injury" or "actual injury" is used in the cases, it must be understood in its legal sense of "violation of a right," — the right being the absolute right of property already described.[6]

The true test of the infringement of this absolute right would seem to be, not whether there is damage, but whether there is such a disturbance of air, water, or soil as is perceptible to the ordinary man under the circumstances, — "such as can be shown by

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[1] "The right to have a stream flow in its natural state without diminution or alteration is an incident of property in the land through which it passes." Per Parke, B., Embrey *v.* Owen, 6 Ex. 353, at p. 368.

[2] "In Orr Ewing *v.* Colquhoun (2 App. Cas. 839, at p. 854), Lord Blackburn points out that the case of Mason *v.* Hill (3 B. & Ad. 304) settled the law that the proprietor of land on the bank of a natural stream above the flow of the tide has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the waters." Per Cave, J., Ormerod *v.* Todmorden, etc., Co., 11 Q. B. D. 155, at p. 160.

[3] "Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him." Per Story, J., Webb *v.* Portland Manf. Co., 3 Sumn. 189, at p. 192.

[4] Parker *v.* Griswold, 17 Conn. 288; Miller *v.* Miller, 9 Pa. St. 74; Wheatley *v.* Chrisman, 24 Pa. St. 298; Newhall *v.* Ireson, 8 Cush. 595; Franklin *v.* Pollard, 6 So. Rep. (Ala.) 685. The same has been held in regard to pollution of the air, in Dana *v.* Valentine, 5 Met. 8; but see expressions *contra* in Sturges *v.* Bridgman, 11 Ch. D. 852.

[5] Crossley *v.* Lightowler, L. R. 2 Ch. 478.

[6] "The pollution of a clear stream is to a riparian owner below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage." Per Fry, J., in Pennington *v.* Brinsop Hall Coal Co., L. R. 5 Ch. D. 769, at p. 772.

a plain witness to a plain common juryman."[1] "If, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual, as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation."[2] What would be a sensible disturbance to property situated in one place would be none to property situated in another, and a disturbance hitherto imperceptible may become perceptible when the land is used for a different purpose.[3]

Whether, when the purity of the air or the quantity of running water[4] is in question, the law imposes an additional test, may be doubted; if so, it is done in the interests of public policy, and does not affect the nature of the right.

Several important consequences flow from considering these rights as corporeal. First, they cannot be *granted away.* These rights are rights against all the world, to prevent interference with property; and if they could be granted away, the only result would be that the grantee, having himself no rights over his grantor's land, would have the right to prevent others from interfering with its natural condition. The right to sue for a nuisance is no more severable than the right to sue for a trespass.

Secondly, they cannot be *destroyed.* Property cannot exist without the incidents annexed to it by law for its protection.

Thirdly, not being rights over the land of another, they cannot be *released.*

Fourthly, being corporeal rights, easements may be granted in them. The right to maintain a nuisance is in strictness a right in or over another's land, and is subject in every respect to the usual laws governing the origin, continuance, and destruction of easements.[5]

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[1] Per James, L. J., in Salvin *v.* North Brancepeth Coal Co., L. R. 9 Ch. 705, at p. 709.

[2] Ibid. [3] Sturges *v.* Bridgman, 11 Ch. D. 852.

[4] The English law would seem to give riparian owners an easement of *reasonable diminution* not granted to non-riparian proprietors. See Ormerod *v.* Todmorden, 11 Q. B. D. 155; but cf. *contra*, Miller *v.* Miller, 9 Pa. St. 74; Wheatley *v.* Chrisman, 24 Pa. St. 298.

There is no such easement of pollution, however. See Blair *v.* Deakin, W. N. (1887) 148.

[5] "It — viz., the right to deprive land of support — was the grant of a right to disturb the soil from below and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a right of way over it." Per Lord Wensleydale, Rowbotham *v.* Wilson, 8 H. L. C. 348, at p. 362.

"There is no claim of an easement unless you make it appear that the offensive smells

II.

If the foregoing analysis of natural rights be correct, it follows, for two reasons, that the English right of access cannot be a natural right. First, it is not a right limited to land in its natural condition; it is not a right given by the law that the owner may preserve intact his own property, but it is a right over the land of another to get to a point where a public right may be exercised.[1]

Secondly, the right of access cannot be a natural right, because it is not the result purely of natural conditions, but is dependent for its existence upon the existence of the public right before referred to. The public, including the riparian owner, having the right to navigate the stream, a private right distinct from the public right[2] is given the riparian owner, as owner, to enable him to get to navigable water, where he can exercise his public right.

The public right depends not upon the natural condition of the stream, whether it is *in fact* navigable, but rather upon whether the stream is *de jure* navigable, — whether, in other words, it is a public highway. The fact that in America streams *de facto* navigable are public highways only obscures the real question. The riparian right of access exists because the land to which it attaches abuts on a public highway, and the fact that the State has made the natural condition of the stream the test of the public right, cannot make the private right of access a natural right.

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had been used for twenty years to go over to the plaintiff's land." Per Lord Denman, C. J., Flight *v.* Thomas, 10 A. & E. 590.

"The right of diverting water . . . is an easement." Per Cockburn, C. J., Mason *v.* Shrewsbury Ry. Co., L. R. 6 Q. B. 578; 40 L. J., Q. B. 293.

[1] "This right of access would seem to include the right of landing in the ordinary manner and of passing over the soil of the bed of the river for that purpose, even where the soil is not in the Crown but in a private owner, as it is necessary for the full enjoyment of the right of navigation (Rose *v.* Miles, 4 M. & S. 101; remarks of Park, J., in Duke of Newcastle *v.* Clark, Moore, Rep. 666), and as the right of navigation exists at all states of the tide (Mayor of Colchester *v.* Brooke, Q. B. 639)." Coulson & Forbes, Law of Waters, p. 421.

[2] "The distinction between the right of access from the river to a riparian frontage, and the right of navigation when upon it, is more than once adverted to by the Lord Chancellor, — viz., in Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, — who referred, certainly not with disapproval, to the judgment of Lord Hatherley, when Vice-Chancellor, in the case of Attorney-General *v.* The Conservators of the Thames (1 H. & M. 1), where that distinction is pointedly taken and acted upon." Bell *v.* The Corporation of Quebec, 41 L. T. Rep. N. S. 451, at p. 455.

The English right would seem, therefore, to be of the nature of an easement over the land of the State,[1] appurtenant to the upland, and strictly analogous both in origin and nature to that attaching to property bordering on highways by land.[2] The origin in the latter right is in the grant of the State at the time of the laying out or dedication of the street.[3] The origin of the former right is similar. It is a mere right of way, which has been granted by implication to the original riparian owner because his land abuts on a natural highway. This easement of ingress and egress is appurtenant to the upland, and of course inseparable from it.

It remains to consider the nature of the American right to wharf out to navigable water.

III.

Where the title of the riparian owner extends *usque ad medium filum aquæ*, the nature of the so-called right to wharf out is of no importance, since the riparian owner may do whatever he pleases with his own soil, taking care not to obstruct navigation. It is only with reference to that class of cases where the riparian owner's title is said to terminate at high-water or low-water mark, that the nature of the right to wharf out becomes important.

The fee to the bed of tidal waters, to the bed of the Great Lakes, and to the beds of some of the large navigable rivers is held to be in the public.[4] But while the riparian proprietor takes only to the water line, he has certain exclusive rights over or in the intervening space between his upland and navigable water. The following digest will indicate how far these rights, when not controlled by statute, have been the subject of decision in America.

In New York the riparian proprietor has no rights below high-water mark, the boundary line of his land.[5]

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[1] When the title to the soil remains in the abutting owner, he is held to have reserved to himself all uses not inconsistent with a public right: (a) in case of highways by land, St. Mary Newington *v.* Jacobs, L. R. 7 Q. B. 47; (b) in case of waterways, Marshall *v.* Ulleswater Co., L. R. 7 Q. B. 166.

[2] Bell *v.* The Corporation of Quebec, 41 L. T. Rep. N. S. 451; Original Hartlepool Collieries Co. *v.* Gibb, 5 Ch. D. 713.

[3] Lahr *v.* Met. Ry. Co., 104 N. Y. 268, 288; Adams *v.* C., B. & N. Ry. Co., 39 Minn. 286, 290–3, and cases cited.

[4] Cases *infra*; Gould on Waters, §§ 32, 82–84, and cases cited.

[5] Gould *v.* Hudson River R. Co., 6 N. Y. 522. (Certain rights are now given by statute. Williams *v.* The Mayor, 105 N. Y. 419.)

In Pennsylvania and Vermont he has a right of access to navigable water, but not a right to wharf out.[1]

In Iowa, though a right of access is denied, a right to wharf out is recognized. Until the right to wharf out is exercised, it is not the subject of interference. It is called a franchise appurtenant to, and inseparable from, the upland, and when exercised, the State is probably divested of its title to the soil under the water.[2]

In New Jersey there is a wharfing-out privilege, — a mere license allowed by custom, and revocable by the State before being acted upon. When acted upon, the license becomes irrevocable.[3]

In Minnesota, Wisconsin, and the United States Supreme Court the right of access and the right to wharf out are both recognized, though apparently treated as one right.[4] In Minnesota the right is called a natural right,[5] and the court has thus far avoided passing upon the nature of the riparian proprietor's title to made lands between the upland and navigable water.[6] The Wisconsin court has said that the right must be exercised in aid of navigation, and that, when so exercised, the structures built are "passively licensed by the State."[7]

In Connecticut there is a right to wharf out, or, as it is sometimes called, a right of reclamation. It is held to be a franchise, and that it may be sold apart from the upland.[8] It has been called an "interest in the soil,"[9] as well as an incorporeal right.[10]

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[1] Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21; Austin *v.* Rutland R. R. Co., 45 Vt. 215.

[2] Tomlin *v.* Dubuque R. Co., 32 Iowa, 106; Musser *v.* Hershey, 42 Iowa, 356.

[3] Gough *v.* Bell, 23 N. J. L. 624; Patterson *v.* Newark R. R. Co., 34 N. J. L. 532. (Now controlled by statute. Hoboken Land Co. *v.* Mayor, etc., 36 N. J. L. 540.)

[4] Brisbine *v.* St. Paul & Sioux City R. R. Co., 23 Minn. 114; Carli *v.* Stillwater Street R. R. & Transfer Co., 28 Minn. 373; Lake Superior Land Co. *v.* Emerson, 38 Minn. 406; Hanford *v.* St. Paul & D. R. Co., 42 N. W. Rep. 596; Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214; Diedrich *v.* Northern Ry. Co., 42 Wis. 248; Lawson *v.* Furlong, 50 Wis. 681; Dutton *v.* Strong, 1 Black, 25; Railroad Co. *v.* Schurmeir, 7 Wall. 272; Yates *v.* Milwaukee, 10 Wall. 497.

[5] Lake Superior Land Co. *v.* Emerson, *supra*. The definition in the Minnesota case of the right to wharf out is founded upon the case of Lyons *v.* Fishmongers' Company. There is nothing in the three opinions rendered in the latter case to justify such a citation, except the remarks of Lord Selborne upon the nature of the right of access. There is no intimation in either the opinion of Lord Cairns or Lord Chelmsford that the right of access is a natural right.

[6] Carli *v.* Stillwater Street R. R. & Transfer Co., 28 Minn. 373; Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297.

[7] Diedrich *v.* Northern Ry. Co., 42 Wis. 248; Lawson *v.* Furlong, 50 Wis. 681.

[8] Simons *v.* French, 25 Conn. 346.

[9] Nichols *v.* Lewis, 15 Conn. 137, 143.

[10] New Haven Steamboat Co. *v.* Sargent & Co., 50 Conn. 199, 203.

When embankments are made, the fee to the made land and submerged soil vests in the riparian owner, by the invocation of a doctrine that the principle of accretion applies as well to artificial deposits as to natural and imperceptible alluvion.[1] The title to wharves, and the right to transfer them apart from the upland, are assumed to be in the riparian owner.[2]

The right of access, or the right to wharf out, when recognized in these jurisdictions, and not a mere license, is a vested right of property, an interference with which must be followed by compensation.

The New Jersey and Iowa doctrine seems to be that the wharfing-out privilege is a license which, when acted upon, divests the State of its title to the submerged soil, on the Connecticut doctrine of accretion, or prevents the State from asserting its title on the principle of estoppel.

The English rule evidently prevails in Pennsylvania and Vermont. There is a right of access to navigable water which, as we have endeavored to show, is an easement of ingress and egress over public lands.

The decisions give color to three different views of the right to wharf out. (1.) That it is a license. (2.) That it is a permissible means of exercising or enjoying the right of access. (3.) That it is an independent right of property.

The first view is suggested by the Wisconsin court, where it says that if the building of a wharf furthers the public use, it is, in the absence of prohibition, "passively licensed by the public, and not a purpresture."[3] But this statement seems to be inconsistent with the holding by the same court, that the right cannot be cut off by the State without compensation.[4] If it is a license, there is no reason why it cannot be revoked before being acted upon.

The second view finds support in the Minnesota case,[5] which relies upon Lyon *v.* Fishmongers' Company, and apparently treats the right to wharf out as being the same as the right of access. The objection to this view is that the term "right of access" is

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[1] Lockwood *v.* N. Y. & N. H. R. Co., 37 Conn. 387.
[2] Simons *v.* French, *supra.*
[3] Diedrich *v.* Northern Ry. Co., 42 Wis. 248.
[4] Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214.
[5] Lake Superior Land Co. *v.* Emerson, 38 Minn. 406.

too narrow and limited to include such large means of exercise. The right to wharf out embraces many privileges which cannot be included in, and have nothing to do with, a mere right of way. It is a right to the exclusive occupation of the submerged soil between the upland and navigable water for docks, wharves, warehouses, coal and lumber yards, mills, and, in fact, for all purposes of the commerce marine.

Taking up the third view, we have already come to the conclusion that the right to wharf out is a right of property wholly independent of the right of access. The nature of the right only remains for consideration.

Starting with the general proposition that the right to wharf out cannot be cut off without making compensation, it must be conceded that it is something more than a license. It is not a natural right. It must be, then, either an easement, or an estate in the submerged soil resting upon an implied grant of the State. It is not unreasonable to assume a grant of this nature. The filling in of shallow water-fronts is conducive to the general welfare in that it is a necessary aid to navigation, and the riparian owner has peculiar advantages and special facilities for making such improvements. At any rate, the assumption of such a grant is a necessary premise to the holding that the right is a vested right of property.

Does this implied grant of the State convey an easement or an estate in the soil under the water? That it conveys an estate in the submerged soil to the line of navigability, and not an easement, is supported by the decisions which have construed express grants of a similar nature.

In a Maryland decision it was said that the right of making improvements on the water front "is a vested right, a *quasi* property, of which they (the riparian proprietors) cannot be lawfully deprived without their consent; and if any other person make such improvement without their authority, such person is a trespasser, and the improvement becomes the property of the owner of the adjacent land."[1]

In a Virginia case the language of the court is: "This right of the riparian owner is not a mere license or privilege, but is prop-

[1] Goodsell *v.* Lawson, 42 Md. 348, 366. The Maryland statute reads as follows: "The proprietor of land on any of the navigable waters of this State is hereby entitled to the exclusive right of making improvements into the waters in front of his said land."

erty, — property in the soil up to the line of navigability, though covered by water; for the wharf, pier, or bulkhead can only be built on the soil. It is not a mere easement to pass over the water or a privilege to use the surface, but property in the soil under the water to which to fasten and build such structures; and for this purpose, and subject to the restriction that navigation shall not be obstructed, is as much property as the land above the margin of a navigable stream."[1] The same effect has been given to a custom[2] and to a colony ordinance[3] authorizing the building of wharves, where it was held that neither the custom nor the ordinance created a mere easement, but was a grant of the soil to low-water mark.

It is not a new doctrine that the right to the perpetual and exclusive use of land is equivalent to ownership, and not a mere easement. In an early English case[4] a grant of the exclusive use of land, with a clause providing that the land itself was not demised, was held to be inconsistent in its terms; and in a New Jersey decision[5] the court said that a grant of "the sole right, privilege, use, and enjoyment at all times for all purposes of fishing whatsoever, and for no other purpose," conveyed an "actual estate, and not a mere license or easement."

No good reason can be given for making a distinction between the right to wharf out which rests upon implied grant, and the same right created by express grant. In both cases the right is exclusive, and gives such use in, and control over, the submerged soil that it cannot be brought within any other class of rights than that of an actual estate in the land. The fact that the

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[1] Norfolk City *v.* Cooke, 27 Gratt. 430. See also Williams *v.* The Mayor, 105 N. Y. 419; Langdon *v.* The Mayor, 93 N. Y. 129; State of Illinois *v.* Ill. Cent. R. R. Co., 33 Fed. Rep. 731, 755 *et seq.*

The Virginia statute is as follows: "Any person owning land upon a water-course may erect a wharf on the same, or a pier or bulkhead in such water-course opposite his land, so that the navigation be not obstructed thereby."

By reference to the Minnesota, Wisconsin, or United States Supreme Court decisions it will be seen that the Virginia statute gives precisely the same right as the common law.

[2] Clement *v.* Burns, 43 N. H. 609.

[3] Storer *v.* Freeman, 6 Mass. 435; Commonwealth *v.* Alger, 7 Cush. 77; Brackett *v.* Persons Unknown, 53 Me. 238; Angell on Tide Waters (2d ed.), 237.

But see Thornton *v.* Grant, 10 R. I. 477; Providence Steam Engine Co. *v.* Providence Steamboat Co., 12 R. I. 348, 363.

[4] Burszord *v.* Capel, 8 B. & C. 141.

[5] Fitzgerald *v.* Faunce, 46 N. J. L. 536, 596–7. See also early cases cited in Fitzgerald *v.* Faunce.

public right of navigation is not abridged until wharves are erected does not require a holding that the fee to the submerged soil is not in the riparian proprietor.[1] The State, however, grants these lands for a particular purpose; namely, to further its commercial interests depending upon navigation. It is not unreasonable, therefore, to say that the grant is upon condition that the land be used for no other purposes than those of the commerce marine. If the property is used for any other purpose, the State should have the privilege of entering and determining the riparian proprietor's estate. Fees-simple with conditions attached that the land shall be used for a particular purpose are not uncommon, and in America such conditions are not in conflict with the rule against perpetuities.[2]

It has been suggested that the grant of the right to wharf out does not vest the title to the submerged soil in the riparian owner until wharves are erected.[3] This theory is at once disposed of by the application of the rule against perpetuities. A grant of an estate in fee-simple which is not to take effect until some owner (present or future) of the upland builds wharves, *may not vest* the fee within twenty-one years after some life in being, and is, therefore, void.[4]

A very important practical result flows from holding the right to wharf out to be an estate in the submerged soil. It is only upon this theory that the right can be transferred apart from the upland. If it is a natural right, it is, of course, inseparable from the riparian estate. If it is an easement, it cannot be separated from the dominant tenement, for unless easements take the form of *profits à prendre* they cannot exist in gross. But if the express or implied grant by the State of the right to wharf out conveys the fee to the submerged soil to the line of navigability, the riparian proprietor's interest in the submerged soil may be severed from the upland and sold in parcels. The right of access is merged in the fee to the line of navigability though it may still exist beyond that point.

Alfred E. McCordic.
Wilson G. Crosby.

DULUTH, MINN., March 15, 1890.

[1] City of Boston *v.* Lecrow, 17 How. 426; Com. *v.* Alger, 7 Cush. 53, 75; State *v.* Wilson, 42 Me. 9.

[2] Gray on Perpetuities, §§ 304-311.

[3] State of Illinois *v.* Ill. Cent. R.R. Co., 33 Fed. Rep. 731, 758-9.

[4] Gray on Perpetuities, § 201 *et seq.*